UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHIRLEY MYERS,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**Civil No. 96-98-P-H**
	)	
SEARS, ROEBUCK & CO.,	)	
	)	
DEFENDANT	)	

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

In this bench trial, the plaintiff Shirley Myers ("Myers") has rested on her case claiming age discrimination in Sears, Roebuck & Co.'s ("Sears") promotion process, and Sears has moved for judgment as a matter of law under Fed. R. Civ. P. 52 before putting on its direct case. I **GRANT** the motion and make the following findings of fact and conclusions of law.

But first, because Myers's lawyer originally intended to present separately a prima facie case and expressed surprise at my direction that he present the plaintiff's entire direct case on discrimination, including pretext evidence, I here set forth my understanding of the role of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), and shifting burdens at this stage of the case, under First Circuit teachings. Before trial, Sears moved for summary judgment, conceding (for summary judgment purposes only) that Myers could make the prima facie case, but

arguing that she did not have evidence of pretext to survive Sears's articulation of a nondiscriminatory reason or reasons for the denied promotion. I denied the motion for summary judgment, ruling that the pretext issue, on the summary judgment record, was a question of fact not appropriate for summary disposition. Order of Oct. 17, 1996. I therefore set the case for trial.

Once a case survives a summary judgment motion and goes to trial, the role of McDonnell Douglas and burden shifting is basically over. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993); Woodman v. Haemonetics Corp., 53 F.3d 1087, 1093 (1st Cir. 1995); Mesnick v. General Elec. Co., 950 F.2d 816, 824-25 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992). Instead, the factfinder has to determine the very basic question: Was discrimination a determining factor in the adverse employment action? See Woodman, 51 F.3d at 1093; Mesnick, 950 F.2d at 825. On this issue, the evidence that makes up the prima facie case as well as the evidence that supports a finding of pretext are both relevant. Indeed the complexities of McDonnell Douglas are wholly inappropriate for a jury's consideration, although the judge might well use the analysis in deciding a defendant's motion for judgment as a matter of law at the end of the plaintiff's case. True, in a bench trial, a judge could structure the trial to hear, first, the prima facie case; then, if the plaintiff succeeded, the defendant's articulation of a nondiscriminatory reason; and finally, if the defendant succeeded, the plaintiff's case on pretext. I saw no reason to do so here because Sears's articulated reason could be anticipated from the summary judgment practice and its trial brief and could be expected to come out during the plaintiff's case; and because it was apparent from the summary judgment practice that the case could probably not be resolved on the prima facie case alone. Therefore, I required Myers to put on her entire case at the outset. That having occurred and because

it was a bench trial, I am entitled at this stage to make certain factual determinations in accordance with Rule 52(c).

FINDINGS OF FACT

1. Shirley Myers has been employed part-time in sales in the shoe department of the defendant Sears Roebuck & Co. since 1987.

2. An opening occurred for the position of "sales coordinator" in the shoe department in 1994.

3. Sears had a country-wide standard description of the sales coordinator position that is not department-specific. Myers did not consult it. The store manager also had his own handwritten list of five criteria that were not disclosed to applicants. They were:

> (1) Direct Sales associates
> (2) Control Markdowns
> (3) Innovative in dealing with Stock Room Problems
> (4) Under new set-up—will be CLC—when over 900,000 [referring to a program which would enable the position to earn the title Sales Manager upon achieving a $900,000 department sales volume]
> (5) Will need some Shoe background with the ability for further advancement.

Grimes Dep. Ex. 12.

4. Myers wanted the promotion and made that known to management. At the time she was 43 and her age was known to Sears management.

5. Myers did not immediately get an interview, told management of her interest several times and finally was given only a short (ten-minute) interview.

6. Interviews of applicants who were not already Sears employees took 15 to 20 minutes.

7. The shorter interview of Myers and even the apparent disinterest in according her an interview were not discriminatory; it is understandable that an interview is more important for an outside applicant not otherwise known to Sears management and that an interview would be considered unnecessary for an employee whose characteristics are already apparent within Sears and, if given, might be short.

8. Management asked several people within the Sears organization if they were interested in the opening and advertised the position in the local newspaper.

9. Management "solicited" for the position at least one employee who is about the same age as Myers, but the employee was not interested.

10. A 22-year-old male Sears employee with no shoe sales experience received the position. He had a college degree, experience with Sears working in this store's footwear replenishment stockroom and outside sales experience.

11. The store manager, age 50 at the time of the promotion decision, has used the term "old timers" in a sometimes deprecating manner. The term was understood by those who heard it as referring to length of employment at Sears, not age, and to refer to those hired before Sears most recently attempted to change its retail mission and image. I conclude that use of the term did not reflect age discrimination.

12. The store manager ultimately selected the 22-year-old in large part because he had a college degree. Education was not a requirement for the job of sales coordinator, but the manager considered the degree an advantage because if the shoe department revenues continued to grow, the

department would soon qualify for a sales manager, and a person with a college degree could participate in Sears's management training program and thus qualify as sales manager. This applicant's experience in the stock room was also material because the store manager believed (and noted in his criteria) that the shoe department had difficulties in stock replenishment, although he did not mention this subject in the interviews.

13. Better personnel practices would have been to make the store manager's criteria known, but sloppy personnel practices do not persuade me that the store manager's use of these criteria was actually a pretext for age discrimination.

14. The store manager told Sears investigators that among the reasons for his selection of the 22-year-old were a good evaluation, a good interview and a college degree.

15. A Sears investigator told Myers that the interview could have been the deciding factor, but in doing so, the investigator did not know that to be the case.

16. The store manager questioned Myers's leadership potential and her sense of "urgency." Her sales manager also did not endorse her for the position of sales coordinator. However, it is undisputed that Myers is an excellent salesperson.

CONCLUSIONS OF LAW

1. Myers has made her prima facie case.

2. Sears has articulated nondiscriminatory reasons for choosing to promote someone else.

3. Myers has not persuaded me, by a preponderance of the evidence, that Sears's reasons are a pretext for age discrimination and thus that her age was a factor in the decision not to promote her. See St. Mary's Honor Ctr., 509 U.S. at 509-25.

4. The plaintiff attempted to have me believe that the store manager made an age discriminatory statement to Paulette Silva by the following evidence: the plaintiff's lawyer put Ms. Silva on the stand and she denied that the store manager ever made such a statement; the plaintiff's lawyer then put the plaintiff on the stand to testify that Ms. Silva had told her out of court that the store manager had made such a statement. Clearly Ms. Silva's out-of-court statement as reported by the plaintiff is not admissible under Fed. R. Evid. 801(d)(1). The statement may be considered as impeachment under Fed. R. Evid. 613, but then it is not admissible for its truth but only to impeach the statement that the plaintiff elicited on direct examination of Ms. Silva (i.e., that she had not heard the store manager make such a statement). The plaintiff's lawyer conceded this at trial, but argued that I could infer that the store manager had made a discriminatory statement from the fact that Ms. Silva denied on the stand that it happened and then was impeached. To accept this argument would turn the Rules of Evidence on their head. The lawyer knew that he could not get any direct admissible evidence on the subject. Instead, he put on the stand someone he knew would deny that the incident happened only so that he could then impeach that witness in an effort to have me disbelieve the negative and thereby infer that a discriminatory statement was actually made. This approach just won't work under the Rules of Evidence. See United States v. Martin, 694 F.2d 885, 888 (1st Cir. 1982); A.B.A., Emerging Problems Under the Federal Rules of Evidence 159 (2d ed. 1991) ("[A] party may not call a witness for the purpose of smuggling inconsistent statements into

evidence under the guise of impeachment in the hope that they will be misused as substantive evidence.").

CONCLUSION

Accordingly, the defendant's motion for judgment as a matter of law is **GRANTED**.

SO ORDERED.

DATED THIS 3RD DAY OF MARCH, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE